

No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

V.

FIRST NATIONAL BANK & TRUST CO., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Credit Union Act (FCUA) limits federal credit union membership "to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district." 12 U.S.C. 1759. The questions presented by this petition are:

1. Whether banks, which the court of appeals found not to be among the intended beneficiaries of the FCUA, nonetheless fall within the "zone of interests" of that Act to have standing to challenge the interpretation by the National Credit Union Administration (NCUA) of the FCUA's common bond requirement.
2. Whether the NCUA permissibly interpreted the common bond provision to permit membership in a federal credit union to consist of multiple groups, so long as each group has its own common bond.

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The Acting Solicitor General, on behalf of the National Credit Union Administration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on the merits (App., infra, 1a-14a) is reported at 90 F.3d 525. The opinion of the district court (App., infra, 43a-54a) is reported at 863 F. Supp. 9. The opinion of the court of appeals addressing standing (App., infra, 15a-31a) is reported at 988 F.2d 1272. This Court's denial of certiorari is reported at 510 U.S. 907. The district court's disposition of the standing issue (App., infra, 32a-42a) is reported at 772 F. Supp. 609. A subsequent opinion of the district court enjoining the National

Credit Union Administration (NCUA) from continuing to implement its interpretation of the Federal Credit Union Act (App., *infra*, 55a-62a) and an order clarifying the injunction (App., *infra*, 63a-65a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1996. A petition for rehearing was denied on October 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1759 of Title 12, United States Code, provides in pertinent part (emphasis added):

Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; *except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a welldefined neighborhood, community, or rural district.*

Section 702 of Title 5, United States Code, provides in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof

STATEMENT

This case presents issues of extraordinary importance to the National Credit Union Administration (NCUA) and to the Nation's federally-chartered credit unions. Overturning an interpretation of the Federal Credit Union Act (FCUA) formalized by the NCUA in 1982, the court of appeals construed the "common bond" provision of the FCUA to require that all members of a federal credit union share a single common bond. The NCUA's interpretation permits membership in a federal credit union to consist of multiple groups, so long as each group had its own common bond. The court of appeals' ruling, as implemented by the district court, immediately and adversely affects nearly 3600 credit unions serving over 32 million people across the country. Those credit unions hold 79% (\$132 billion) of the deposits (shares)¹ and 78% (\$94 billion) of the loans of the federal credit union system.

1. a. Congress enacted the FCUA in 1934, after the Great Depression caused the collapse of the Nation's credit markets. Ch. 750, 48 Stat. 1216. At that time, funds available for loans became scarce, and interest rates rose too high to enable persons of limited means

¹ In the parlance of credit unions, deposits of funds by persons are the "purchase" of "shares" by "members" of the credit union. See App., *infra*, 2a.

to purchase goods on credit. See S. Rep. No. 555, 73d Cong., 2d Sess. 1, 3 (1934); H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Because Congress perceived that the Nation's "industrial recovery depend[ed] on the buying power" of ordinary citizens, it established "a Federal Credit Union System" to "bring normal-credit resources on a cooperative basis-" to people. S. Rep. No. 555, *supra*, at 1, 3; see H.R. Rep. No. 2021, *supra*, at 1-2. Borrowers would benefit by having an alternative to banks that often would not lend small amounts of money to persons lacking the requisite security, and to "loan sharks" that charged usurious rates. See, *e.g.*, 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard); *id.* at 12,224 (remarks of Rep. Luce). An expansion of credit unions would also facilitate the education of "members in matters having to do with the sane and conservative management of their own money." S. Rep. No. 555, *supra*, at 2.

Expanding access to credit unions, therefore, was a congressional priority. For despite the country's financial upheaval, in the "38 States and in the District of Columbia" where credit unions operated, there had been "no involuntary liquidations," and credit unions had compiled an "exceptional" "record for honest management." S. Rep. No. 555, *supra*, at 2. See also 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard); *id.* at 12,225 (remarks of Rep. Patman).

Under the FCUA, each federal credit union is funded by shares purchased by its members, see 12 U.S.C. 1757(6), and makes loans exclusively to its members and to other credit unions or credit union organizations, 12 U.S.C. 1757(5). The members control the credit union on a democratic basis, with each member having an equal vote regardless of the amount of money held in the institution. 12 U.S.C.

1760. Federal credit unions are managed by a board of directors, a supervisory, committee, and (on occasion) a credit committee, all consisting of credit union members who, save for one, serve without compensation. 12 U.S.C. 1761.

In 1970 Congress created the NCUA and empowered it to charter, examine, and supervise federal credit unions. Pub. L. No. 91-206, 84 Stat. 49. The NCUA has the authority to "prescribe rules and regulations for the [FCUA's] administration." 12 U.S.C. 1766(a). Congress intended the NCUA to "provide more flexible and innovative [credit union] regulation." S. Rep. No. 518, 91st Cong., 1st Sess. 3 (1969).²

b. Since its passage in 1934, the FCUA has limited membership in a federal credit union to "groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. See ch. 750, § 9, 48 Stat. 1219. The history behind the original FCUA legislation reveals little about Congress's precise intent in using the phrase "common bond," but the requirement immediately facilitated the expansion of credit unions, because it was "easier to promote the idea of a credit union to a group or an association whose members already had a common bond." Letter from E. F. Callahan, NCUA Chairman, to Fernand J. St Germain, Chairman of House Comm. on Banking, Finance and Urban Aff., at 8 (Oct. 28, 1983) (Callahan Letter), C.A. App. 534; see also A. E. Burger & T. Dacin, *Field of Membership: An Evolving Concept* 8 (2d ed. 1992), C.A. App. 571 (organizing

² The NCUA also insures all federal credit union member accounts. See 12 U.S.C. 1781.

credit unions around "particular groupings" was its simply easier" and. involved "generally lower" i6start-up costs").

c. In response to changing economic conditions, the NCUA and its predecessors from time to time have modified their application of the common bond provision.³ In 1982 the NCUA adopted a policy permitting the establishment of credit unions consisting of "multiple occupational * * * groups." Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16,775. Under this policy, the agency permitted a credit union to add "distinct group[s]" to its field of membership, so long as each group had its own common bond and was within a well-defined area near the credit union's offices. IRPS 82-3, 47 Fed. Reg. 26,808 (1982).

In a 1983 letter to the Chairman of the House Committee on Banking, Finance and Urban Affairs, see C.A. App. 528, NCUA Board Chairman E. F. Callahan explained the important purposes served by the NCUA's policy. First, experience showed that "some groups were too small either by themselves or when

³ Thus, for example, in 1967 federal credit union regulators replaced their requirement that members of a federal credit union be "extensively acquainted" with each other with the requirement that members simply "know" one another. GAO, *Credit Unions: Reforms For Ensuring Future Soundness* 217 (July 1991), C.A. App. 553. A year later, regulators instituted a policy that, once a person became a credit union member, he or she could remain a member for life. *Ibid.* And in 1972 the NCUA took account of the growing phenomenon of industrial and commercial parks to permit satisfaction of the common bond requirement "if the employees are so situated that as a consequence of their employment and relationship they can be expected to effectively operate a credit union." NCUA, *Organizing a Federal Credit Union* 7 (Sept. 1972), C.A. App. 456.

grouped together to support a viable credit union," so a policy of permitting multiple group additions ensured that credit unions "could serve groups not otherwise eligible for a viable credit union charter." *Id.* at 536. Second, permitting diversification of credit union membership provided a measure of protection against "hard economic times." *Ibid.* As Chairman Callahan pointed out, "[c]redit unions that served only one employer or one industry could be forced into liquidation by plant closings or major industrial slumps." *Id.* at 535-536. By contrast, "a credit union whose membership was made of distinct groups, each group serving different employees or industries, could continue to serve its members," thereby furthering the FCUA's intent to promote "a national system of cooperative credit." *Ibid.*

The NCUA consolidated and restated its chartering and field of membership policy in 1989. See IRPS 89-11 54 Fed. Reg. 31,168. At that time, the agency reaffirmed that it would permit "select group additions" to federal credit union membership. *Id.* at 31,176. The agency again made clear that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond," but counseled that "[t]he group's common bond need not be similar to the common bond(s) of the existing Federal credit union." *Ibid.* The NCUA reiterated its new position through a policy statement issued in 1994. See IRPS 94-1, 59 Fed. Reg. 29,066, 29,078, 29,085.

d. From the inception of the NCUA's revised common bond policy, Congress has been made aware of the agency's policy by the NCUA itself, lobbyists from the banking industry, and the General Account-

ing Office (GAO). See, e.g., NCUA Ann. Rep. to Congress 1 (1982), C.A. App. 527; Callahan Letter, *supra*; *Unrelated Business Income Tax: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 1883 (1987) (comments of the American Bankers Association objecting to NCUA's expanded interpretation of the common bond requirement as unfair because it "allow[ed] credit unions to compete with banks and savings and loans for customers among the general public" and complaining that the common bond requirement already "had been loosely interpreted for many years before [1982]"); GAO, *Credit Unions: Reforms for Ensuring Future Soundness* 218-219 (July 1991), C.A. App. 554-555. Despite amending the FCUA many times since 1982, Congress has never altered NCUA's current construction of the common bond provision.⁴

⁴See Act of Jan. 12, 1983, Pub. L. No. 97-457, §§ 25-29, 96 Stat. 2510-2511; Secondary Mortgage Market Enhancement Act of 1984, Pub. L. No. 98-440, § 105, 98 Stat. 1691 (Oct. 3, 1984); Housing and Community Development Technical Amendments Act of 1984, Pub. L. No. 98-479, § 206, 98 Stat. 2234 (Oct. 17, 1984); Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, §§ 701-716, 101 Stat. 652 (Aug. 10, 1987); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, Titts. IX, XII, 103 Stat. 446, 519 (Aug. 9, 1989); Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, § 206, 103 Stat. 1310 (Nov. 28, 1989); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, Tit. III, 103 Stat. 864 (Nov. 9, 1989); Crime Control Act of 1990, Pub. L. No. 101-647, Tit. XXV, 104 Stat. 4859 (Nov. 29, 1990); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, §§ 251, 313, 105 Stat. 2331, 2368 (Dec. 19, 1991); Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 1501-1504, 1604-1605, 106 Stat. 4044, 4081 (Oct. 28, 1992);

2. a. Several North Carolina banks, joined by the national trade association for the banking industry (the banks), filed the present suit. The banks sought to overturn the NCUA's 1989 and 1990 approvals of requests by AT&T Family Federal Credit Union (ATTF), a federally-chartered credit union headquartered in Winston-Salem, North Carolina, to expand its field of membership to include various groups of employees of small businesses chiefly based in North Carolina and Virginia. See App., *infra*, 2a, 18a. All told, ATTF has approximately 111,000 members, 35% of whom are employees of AT&T (or affiliates) and the rest of whom are employees of "select employee groups" that were added pursuant to the NCUA's multiple group policy. The suit alleged that the NCUA approvals violate the statutory limitation on federal credit union membership to "groups having a common bond of occupation or association." 12 U.S.C. 1759. After permitting ATTF and the Credit Union National Association to intervene as defendants, the district court dismissed the banks' claims for lack of standing. The court held that the banks were not within the "zone of interests" protected by the FCUA. App., *infra*, 36a-42a.

b. The court of appeals reversed and remanded the case for proceedings on the merits. App., *infra*, 15a-31a. The court held that, although the banks were not the "intended beneficiaries" of the FCUA, they nonetheless were "suitable challengers" to enforce the

National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-60, § 2854, 107 Stat. 1908 (Nov. 30, 1993); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320606, 108 Stat. 2119 (Sept. 13, 1994); Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (Sept. 23, 1994).

statute's "common bond" requirement. *Id.* at 19a. ATTF and its trade association filed a petition for certiorari, which this Court denied. *AT&T Family Fed. Credit Union v. First Natl Bank & Trust Co.*, 510 U.S. 907 (1993).⁵

c. On remand, the district court granted summary judgment to NCUA and ATTF, holding that the NCUA's construction of Section 1759 was "a reasonable construction of an ambiguous statute." *App.*, *infra*, 54a.

d. Again the court of appeals reversed. The court concluded that Congress's intent to limit federal credit union membership to groups that are bound by a single common bond is "clearly discernible from the statutory text and the purpose of the statute." *App.*, *infra*, 6a. Invoking *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court determined that Congress had spoken "directly" and "unambiguously" to the question in a manner inconsistent with the interpretation given to it by the NCUA. Finding no ambiguity in the statutory language, the court concluded that deference was inappropriate. See *App.*, *infra*, 5a-6a.

The court first reasoned that the term "common bond" in Section 1759 "would be surplusage if it ap-

⁵ The NCUA opposed the petition for certiorari because of the interlocutory posture in which the issue came to the Court, and advised that the issue would be more efficiently handled after the merits of the case had been decided. The NCUA nonetheless agreed with the petitioners that "the respondent banks are not within the zone of interests protected by the common bond provision of the Federal Credit Union Act." *Gov't Br. in Opp.* at 5-6, *AT&T Family Fed. Credit Union v. First Natl Bank & Trust Co.*, 510 U.S. 907 (1993) (No. 922010).

plied only to the members of each constituent group and not across all groups of members" in a federal credit union because "the members of a group are by definition bonded." App., *infra*, 7a. Thus it found that the text of the "Act clearly forecloses" the possibility of "the employees of unaffiliated Company B * * * join[ing] the [federal credit union] at Company A." *Id.* at 8a.

The court further analyzed the statutory text by comparing use of the term "groups" in the parallel provisions of Section 1759: one involving "groups having a common bond of occupation," and the other consisting of "groups within a well-defined neighborhood, community, or rural district." App., *infra*, 8a. Noting that, as to the latter, "[t]he statute does not allow multiple groups, each within a different neighborhood, to form a single community [federal credit union]," the court reasoned that "[n]or therefore can the statute consistently allow multiple groups, each drawn from a different occupation (which the NCUA equates with a different employer ⁶), to form an occupational [federal credit union]." *Id.* at 9a.

The court did not find the legislative history to be so contrary to its textual analysis as to require a different result. It rejected the NCUA's arguments that its regulations provided other limitations to the growth and development of federal credit unions, and concluded that the over-arching purpose of the FCUA was to "unite[] credit union members in a cooperative venture," a purpose that would be frustrated by the NCUA's interpretation allowing multiple unrelated groups to form an occupational federal credit union.

⁶ That is not, in fact, the NCUA's position. See pp. 20-21, *infra*.

App., *infra*, 12a. Based on that reasoning, the court held that "all members of [a federal credit union] must share a common bond," and "[i]f there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only." *Id.* at 14a. The court reversed the district court's judgment and remanded the case "for the entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF." *Ibid.* On October 23, 1996, the court denied rehearing ⁷

e. On October 7, 1996, the American Bankers Association and two other plaintiffs filed a new action in district court seeking a temporary restraining order preventing the addition of new "select employee groups" to all federal credit unions, as well as barring the addition of new members to any existing such group. *American Bankers Assn v. NCUA*, No. 96CV-2312 (TPJ). The district court consolidated this new action with the existing case. On October 25, 1996, based on the D.C. Circuit's prior determination setting the meaning of the statutory common bond provision, the district court declared unlawful "membership in a federal credit union by individuals or groups of individuals who do not share a single common bond of occupation with all other members thereof" App., *infra*, 61a. Accordingly, that court

⁷ The meaning of the common bond provision in the FCUA is also currently pending before the Sixth Circuit in *First City Bank v. NCUA*, No. 95-6543. As we discuss at pp. 28-29, *infra*, the pendency of that appeal does not diminish the importance of granting certiorari in this case.

permanently enjoined the "National Credit Union Administration, its officers, attorneys, agents, employers, and all others in active concert or participation with it, including [ATTF and the Credit Union National Association] * * * from henceforth authorizing occupational federal credit unions to admit members who do not share a single common bond." Ibid.

The October 25, 1996, order applies the D.C. Circuit's common bond ruling on a nationwide basis through an injunction covering the NCUA's regulation of all credit unions. Under the injunction, as clarified, no new groups may be added to existing multiple group credit unions, and no new members may be added to "existing occupational groups that do not share a common occupational bond with a credit union's core membership." App., *infra*, 65a. Still pending in the district court is the banks' motion to order retroactive divestiture of groups or members who do not share a common bond with the core group.⁸

⁸ The NCUA has sought from the district court a stay of the effect of its nationwide injunction until this Court can rule on the underlying merits of the decision on which the injunction is based. The agency has highlighted the massive disruption the district court's order is causing, while the plaintiff banks are not suffering significant, cognizable injury. The court has not yet ruled on the stay request.

The NCUA also has taken interim, emergency steps to deal with the nationwide injunction. The agency has temporarily changed some of its rules in order to allow certain occupational credit unions to change their status either to that of a community-based credit union or to a single common bond based on a designated trade, industry, or profession. See IRPS 96-2, 61 Fed. Reg. 59,305 (Nov. 22, 1996). These steps will enable some credit unions to retain some of their disputed membership groups, and still be consistent with the D.C. Circuit's rul-

REASONS FOR GRANTING THE PETITION

The court of appeals' decision expands the concept of standing under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, well beyond this Court's precedents, in conflict with another court of appeals; it misconstrues the Federal Credit Union Act (FCUA); and it threatens nationwide instability and losses in the credit union industry affecting millions of persons.

This Court has made clear that, to have standing to challenge administrative actions under the APA, a complainant must suffer an injury that falls within the "zone of interests" that Congress intended to protect in the underlying statute. *Lujan v. National Wildlife Fedn*, 497 U.S. 871, 883 (1990). By holding that banks have standing to challenge the rules for federal credit union membership established by Congress and implemented by the NCUA, the court's decision squarely conflicts with *Branch Bank & Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987).

On the merits, the court's decision overturns a policy that has been in place since 1982, and upon which thousands of federal credit unions have relied. The NCUA policy construed the statutory phrase "groups having a common bond of occupation or association," 12 U.S.C. 1759, to permit more than one

ing. These temporary, emergency rules, however, are expected to provide some help in only approximately one-half of the credit unions affected by the nationwide injunction. Thus, even with these emergency measures, the effect of the D.C. Circuit's decision is being felt immediately by thousands of credit unions. In addition, the plaintiffs in the pending district court action have already challenged the validity of even these temporary, emergency measures.

group to join together in a single federal credit union so long as a "common bond of occupation or association" existed for all the members of each group. The court below erred by holding that that phrase could only be construed to mean one group whose members "shared" a "common bond of occupation or association." The court's interpretation is inconsistent with the text and history of the FCUA, as well as the NCUA's longstanding administrative interpretation, which is entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The court's ruling threatens the survival of many existing federal credit unions across the country. To date, nearly 3600 federal credit unions (or 50% of all federal credit unions nationwide) have relied on the NCUA's common bond policy to absorb some 158,000 employee groups, with millions of members. Of the Nation's 200 largest federal credit unions, 158 have multiple employee groups, with such groups constituting 38% of their credit union's membership. By determining that such membership is contrary to the governing statute, the court's decision adversely affects credit unions with more than 32 million members, assets of \$150 billion, loans of \$94 billion, and \$132 billion in member shares.

The commercial uncertainty created by the court's decision far outweighs any benefits this Court might derive from further percolation of the legal issues presented—particularly since the lower court's nationwide injunction and the venue provision applicable to suits brought against the NCUA are almost certain to pretermitt any subsequent litigation on the substantive issue. Accordingly, the petition for a writ of certiorari should be granted. We have expedi-

tiously filed this petition, seeking a ruling by this Court during the current Term, in the hope that the extreme disruption in the credit union industry can be resolved quickly.

1. The court of appeals' decision on standing constitutes an unwarranted expansion of this Court's test for prudential "zone of interests" standing, and it conflicts with the decision of the Fourth Circuit in *Branch Bank & Trust Co. v. NCUA*, 786 F.2d 621 (1986), cert. denied, 479 U.S. 1063 (1987). An entity does not have standing to bring suit under the Administrative Procedure Act, unless it can show that it has in fact been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. Thus, it must show that the injury of which it complains "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan*, 497 U.S. at 883. See also *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 523 (1991). Courts must examine "Congress' intent in enacting [the relevant statutes] in order to determine whether [the banks] were meant to be within the zone of interests protected by those statutes." *Id.* at 524.

The court below found that "Congress did not, in 1934, intend to shield banks from competition from credit unions." App., *infra*, 21a. Indeed, as the court explained, "the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that the banks disdained." *Ibid.* Neither the text nor the history of the FCUA and its many amendments indicates any concern by Congress "about the

competitive position of banks," as the court below acknowledged. *Id.* at 22a. The court nonetheless held that banks are "suitable challengers" to enforce the FCUA's common bond requirement because there is "a reason to think" that the banks' interest in "patrolling a statutory picket line will bear some relation to the congressional purpose" underlying the statute. *Id.* at 27a-28a (emphasis added). See also *Community First Bank v. NCUA*, 41 F.3d 1050, 1054 (6th Cir. 1994). The lower court's standing determination thus permits plaintiffs to bring claims not only when the statute evinces no clear purpose to benefit them, but also, paradoxically, when Congress gave every indication that it did not intend to benefit them.

In identical circumstances, the Fourth Circuit has held that banks have no standing to challenge the NCUA's interpretation of the common bond requirement. That court found that "the general purposes of the [FCUA], rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited personal means." *Branch Bank*, 786 F.2d at 626. Given the rationale for the common bond requirement, the Fourth Circuit held, "we will not attribute to it a meaning that is at cross purposes with the general goals of the statute. If the NCUA were seen to violate the common bond requirement to the detriment of credit union members, they would possess standing to sue. The banks, by virtue of the statute, simply do not occupy a similar position." *Ibid.*

The lower court attempted to distinguish *Branch Bank* on the basis of this Court's intervening decision in *Clarke v. Securities Indus. Assn.*, 479 U.S.

388, 399-400 (1987). In *Clarke*, this Court held that an association of securities dealers had standing to challenge a decision by the Comptroller of the Currency allowing a national bank to set up discount brokerage offices. The Court explained that "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399. In *Clarke*, this Court upheld the standing of the securities dealers because they were attempting to enforce a requirement that was intended by Congress to limit the reach and scope of services offered by national banks. *Id.* at 403.

The court below concluded that *Clarke* supports the proposition that banks have standing as "suitable challengers" to the FCUA requirement that groups forming credit unions must have a "common bond." Yet unlike in *Clarke*, the banks' suit impedes the congressional purpose of the statute, which is to promote the accessibility and growth of federal credit unions. Contrary to the court's analysis, *Clarke* is perfectly consistent with a rule that would deny the banks' standing in this situation.⁹

⁹ The plaintiff banks were found to lack standing in *Branch Bank*. Their petition for certiorari on the standing issue was, pending before this Court while *Clarke* was under submission. The Court held the petition pending disposition of *Clarke*, but when *Clarke* was decided, the Court did not grant certiorari, vacate, and remand the decision in *Branch Bank* in light of *Clarke*. Instead, it denied certiorari outright. 479 U.S. 1063 (1987). This treatment negates the D.C. Circuit's view that the decision in *Clarke* undermined the continuing validity of the

This Court's more recent decision in *Air Courier*, which the court below did not discuss, lends support to the correctness of the Fourth Circuit's reasoning in *Branch Bank*. In *Air Courier*, this Court eschewed any discussion of the "suitable challenger" test adopted by the D.C. Circuit. In that case, postal employees challenged a decision by the U.S. Postal Service to permit private companies to engage in certain mailing practices, a decision the plaintiffs claimed violated the postal monopoly created by the Private Express Statutes. This Court simply stated that it must inquire into whether the plaintiffs were meant to be within the zone of interests protected by those statutes. 498 U.S. at 524. Finding no evidence that the statutes were intended for the benefit of the plaintiffs, the Court concluded that they lacked standing. *Id.* at 524-526. The Court made no inquiry into whether the plaintiffs would be "suitable challengers" to attack the agency's interpretation of the statutes, and nothing in *Air Courier* suggests that Clarke changed the longstanding principles upon which "zone of interests" standing should be analyzed. See, *e.g.*, *id.* at 523, 529-530; see also Clarke, 479 U.S. at 399 (determining whether a statute is aimed at protecting the interests of the plaintiff may indicate "whether Congress 'intended for [that plaintiff] to be relied upon to challenge agency disregard of the law'") (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984)).

A square conflict thus exists among the circuits on the standing issue presented in this case. That con-

Fourth Circuit's ruling in *Branch Bank*. There is no reason to doubt that *Branch Bank* still represents the law in the Fourth Circuit.

flict is of considerable importance even beyond the type of challenge made by banks to the NCUA's construction of the FCUA because the D.C. Circuit has applied its "suitable challenger" test in a number of cases since its decision in this case.¹⁰

2. Independent of the standing issue, review is also warranted on the merits of the court's decision to overturn the NCUA's established construction of the FCUA's common bond requirement. The court of appeals misapplied Chevron in failing to defer to the NCUA's reasonable interpretation of the statute Congress charged it with administering.

By limiting federal credit union membership to "groups having a common bond of occupation or association," 12 U.S.C. 1759, the FCUA allows for the possibility that membership in a federal credit union may consist of more than one employee group. At worst-as the court of appeals appeared initially to recognize-the statute is ambiguous: "the plural noun, *groups*' could refer * * * to multiple groups in a single [federal credit union]," or "to each of the groups that forms a credit union." *App., infra*, 6a. The court nonetheless overturned the agency's construction by concluding that, despite the apparent imprecision of the statutory language, Congress's intent to require that all members of a federal credit union share a common bond is "clearly discernible" from the statute's text and purpose. *Ibid.* That analysis is flawed.

¹⁰ See, e.g., *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1359-1360 (D.C. Cir. 1996); *Liquid Carbonic Industries Corp. v. FERC*, 29 F.3d 697, 705706 (D.C. Cir. 1994).

a. The NCUA's interpretation of the common bond provision is consistent with the language of the statute. By its terms, the statute limits "Federal credit union membership" to "groups" having a common bond. The NCUA's policy is based on the statute's use of the plural form of the word "group," which makes clear in and of itself, that the membership of a federal credit union can have more than one group.

The language of the opening portion of Section 1759 also supports the conclusion that Congress's reference to "Federal credit union membership" was intended to refer to membership in a single credit union that might include multiple "groups." Section 1759 begins by specifying that "Federal credit union membership" shall consist of "the incorporators and such other persons and * * * organizations" who shall "subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors." 12 U.S.C. 1759 (emphasis added). The word "its" clearly refers back to the term "credit union" as used in the initial phrase, "Federal credit union membership." Those requirements clearly apply to a single credit union. The provision's subsequent reference to "groups" in the context of "Federal credit union membership" is therefore best understood as embracing a single federal credit union. There is no reason to think that Congress used the phrase "Federal credit union membership" in any different manner when it set forth the common bond requirement later in the same sentence. See, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469@ 479 (1992) ("identical terms within an Act bear the same meaning"). Accordingly, it was entirely reasonable for the NCUA to read the common bond provision to permit "a credit

union" to be composed of several member groups, each with its own common bond.

b. Under *Chevron*, 467 U.S. at 843, courts are required to defer to an agency's reasonable construction of a statute that it administers if Congress has not addressed the precise question at issue. See *Clarke*, 479 U.S. at 403 ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.") (quoting *Investment Co. Institute v. Camp*, 401 U.S. 6171 626-627 (1971)). The court of appeals nonetheless concluded that it was "not required to grant any particular deference to the [NCUA's] parsing of statutory language or its interpretation of legislative history" when attempting to discern congressional intent "from the statutory text and the purpose of the statute." App., *infra*, 6a (quoting *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133,141 (D.C. Cir. 1984)). This Court, however, has rejected the proposition that *Chevron* deference is inapplicable to "a pure question of statutory construction." *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112Y 123 (1987). See also *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 8109 813-814 (1995) ("If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'). According due deference, the court of appeals should have accepted the NCUA's interpretation of the -common bond requirement.

c. The NCUA's interpretation promotes the congressional purposes expressed in the FCUA. Congress enacted the FCUA to promote a "form of credit

organization capable of reaching the masses of the people." S. Rep. No. 555, *supra*, at 3. The NCUA's multiple employee group policy directly advances that goal by permitting employees of small businesses to gain access to credit union services even though those businesses might not have enough potential members to establish a viable stand-alone institution. The FCUA also was designed to "promote the growth of credit unions" and "enhance credit union stability." See *Community First Bank*, 41 F.3d at 1054. The NCUA's policy substantially furthers those goals by ensuring that a single credit union will not be unduly dependent upon the fortunes of a particular company or industry. The court's decision thwarts these statutory concerns.

Notwithstanding the documented congressional purpose to enhance the growth potential of federal credit unions, the court below believed that too much growth would hamper the ability of a credit union to "be a cohesive association" and thus negate a key distinction between banks and credit unions, the latter of which "could 'loan on character.'" App., *infra*, 11a (quoting *First National Bank*, App., *infra*, 22a). The court failed, however, to recognize that the NCUA policy achieves that objective; a member's relationship to the credit union is established through the employer group, thereby enhancing cohesiveness and improving the likelihood that the member will repay the loan. As interpreted by the NCUA, the common bond requirement serves an important purpose by ensuring that each group within a particular credit union has a link among its members; it simply does not require that there be a single link binding together all of the members of the various groups making up a credit union.

Moreover, the court's analysis misunderstands the FCUA and its legislative history. The FCUA places no limit on the size of federal credit unions, and Congress was well aware when it passed the statute in 1934 that some state credit unions had grown sufficiently large that personal knowledge of every borrower's character was impossible. See *Credit Unions: Hearing Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933) (statement of Roy F. Bergengren) (noting that Boston's Telephone Workers Credit Union had 16,000 members).¹¹

d. The court of appeals erred in concluding that the term "common bond" as used in the FCUA would be rendered "surplusage" by the agency's construction. See App., *infra*, 6a-7a. First, the court mistakenly assumed that the common characteristics that define a "group" under the statute must necessarily be the same as the unifying relationship between individuals embraced in the statutory term "common bond." *Id.* at 7a. Under the NCUA's interpretation, the requirement that members have a "common bond" is in addition to their being part of a "group." To join an occupational credit union under the NCUA policy, a group must show not just that it is defined by an occupational characteristic, but that its members are connected with one another in a relationship sufficiently substantial to qualify as a "common

¹¹ Moreover, in this regard the court below simply gave too much weight to a concern that has been ameliorated by modern technology. and the widespread availability of credit information, which have lessened the necessity for lending officials to be personally acquainted with a borrower to evaluate his or her creditworthiness or the likelihood that a loan will be defaulted.

bond." The agency's interpretation thus gives meaning both to the term "group" and the term "common bond," and renders neither redundant.¹²

Second, the court's construction neglects other important words in the statutory provision. For example, if "a common bond is implicit in the term 'group,'" and all members "must share a common bond," App., *infra*, 7a., then all members of a federal credit union ultimately must be members of a single encompassing group. But the FCUA limits federal credit union membership to "groups having a common

¹² The court of appeals equated the FCUA's use of the term "group" and the term "common bond" by relying on a dictionary definition of "group" as "an assemblage . . . having some resemblance or common characteristic." See App., *infra*, 7a. On the basis of this definition, the court concluded that "a common bond is implicit in the term 'group.'" *Ibid.* But the common characteristic that defines a group can be tenuous or trivial. As the dictionary relied upon by the panel states in a definition for the word "group" that the panel did not quote—a "group" can mean "[a]n assemblage of persons or things" that are "regarded as a unit" simply "because of their comparative segregation from others." *Webster's New International Dictionary of the English Language (Webster's)* 955 (1917) (definition 3). Thus, a group can simply mean "a cluster," or an "aggregation." *Ibid.* By contrast, a "bond" connotes a more substantial connection between individuals—a "uniting" or "cementing" force. 1 *The Oxford English Dictionary* 981 (1933); accord *Webster's*, *supra*, at 251 (a "bond" is "[a] binding force or influence," or "a uniting tie").

The NCUA's regulations expressly recognize the difference between the characteristics that may define a group and those that satisfy the common bond provision. Thus, the agency does not permit a federal credit union to represent "[p]ersons employed or working in Chicago, Illinois," because such occupational groups are insufficiently defined. See IRPS 94-1, 59 Fed. Reg. at 29,076; IRPS 89-1, 54 Fed. Reg. at 31,169.

bond of occupation or association." 12 U.S.C. 1759 (emphasis added). The court suggested that "the plural noun 'groups' could refer not to multiple groups in a single [federal credit union] but to each of the groups that forms a credit union." App., *infra*, 6a. The statute nonetheless equally allows for the possibility that more than one group can join a single federal credit- union, as the district court held here and as the legislative history clearly contemplates. See H.R. Rep. No. 2021, *supra*, at 3 (describing federal credit union membership as being "limited to groups having common bonds of occupation or association").

Finally, the fact that the statute limits community federal credit union membership to "groups within a well-defined neighborhood, community, or rural district," 12 U.S.C. 1759, does not support the lower court's reading of the provision requiring a common bond in occupational groups. See App., *infra*, 9a. The NCUA interprets the former to restrict a community federal credit union's field of membership to a single geographic area—a construction grounded in the requirement that a community-based federal credit union serve groups "within" a well-defined locale. The NCUA's construction of Section 1759 does not give the word "groups" a meaning in the common bond provision different than in the community field of membership provision.

For these reasons, the court of appeals erred in concluding that the statute can be read in only one way. When a statute is susceptible of multiple interpretations, the agency's reasonable construction is entitled to deference. *Chevron*, 467 U.S. at 843 & n.11. Well aware of the NCUA's interpretation, see pp. 6-8, *supra*, Congress has not overturned that policy in the numerous FCUA amendments enacted

since 1982. As this Court has stated, such "a refusal by Congress to overrule I an agency's construction of legislation is at least some evidence of the reasonableness of that construction." *United States v. River-side Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

3. a. Immediate review by this Court is warranted.

The lower court's ruling undermines the legal basis sustaining the charters of nearly 3600 credit unions serving over 32 million people throughout the country. Those credit unions face imminent harm from the district court's nationwide implementation of the court of appeals' ruling. The inability to add new members from existing select employer groups erodes the health of credit unions, which must continually add new members in order to replace those lost through attrition from death, retirement, or other circumstances; it also creates strong disincentives to the continued participation by those employer groups who cannot add new employee members. In addition, the inability to attract new groups and new group members impinges on the justifiable expectations of credit unions that have made or committed to make at least \$243 million in capital improvements, branch expansions, and additions of personnel and equipment.

These concerns are not merely theoretical. Petitioner estimates that over 200 multiple group federal credit unions will begin to suffer financial losses in less than six months. The percentage of financially threatened credit unions rises with each month that the lower court's ruling remains the controlling law out the country. Petitioner estimates that the credit unions chartered under the NCUA common bond policy will henceforth suffer an aggregate amount of \$32.5 million per month in lost loan income.

b. This Court should not await further percolation on the legal issues presented even though the identical issues have been argued and submitted in the Sixth Circuit.¹³ While ordinarily this Court might consider waiting to grant certiorari to gain the benefit of the Sixth Circuit's analysis, in this instance any possible benefit of further percolation is greatly outweighed by the - continued commercial harm and uncertainty created by the lower court's rulings. Because of the nationwide injunction issued in reliance on the D.C. Circuit's decision, with the exception of the pending Sixth Circuit decision, there is almost no possibility of a conflict developing. If the Court does not grant certiorari in this case, and the Sixth Circuit rules in favor of the NCUA, the agency would have no basis for petitioning for certiorari in that case. Given the nationwide scope of the district court's injunction on remand, the banks in the Sixth

¹³ There, the district court relied on a previous Sixth Circuit decision, *Community First Bank v. NCUA*, 41 F-3d 1050, 1054 (1994), to hold that a plaintiff bank had standing to challenge the NCUA's interpretation of the FCUA common bond requirement. *First City Bank v. NCUA*, Civ. No. 3:940334 (M.D. Tenn. Dec. 15, 1994). *Community First Bank*, in turn, had followed the D.C. Circuit's standing analysis in the instant case.

The district court in *First City Bank* subsequently upheld the agency's interpretation of the common bond requirement, finding that the NCUA had acted within the scope of its delegated authority in its application of the statute. *First City Bank v. NCUA*, 897 F. Supp. 1042, 1046 (M.D. Tenn. 1995). The plaintiff bank has appealed, and this issue is now before the Sixth Circuit.

Circuit case might well conclude that it is in their interest not to seek review by this Court.¹⁴

Furthermore, even absent a nationwide injunction, banking organizations would invariably bring subsequent suits challenging the NCUA's application of the common bond requirement in the District of Columbia.¹⁵ Therefore, the prospects of any future case producing a circuit conflict are highly remote. Not only is this Court unlikely to derive benefit from delay in consideration of the merits issue raised here, but federal credit unions throughout the country that have relied upon NCUA's construction of the statute would suffer grave commercial harm by the Court's failure to grant a petition for certiorari at this time.

¹⁴ For this reason, in the event the Court determines not to consider the issues presented in this petition until after the Sixth Circuit issues its opinion in *First City Bank*, we respectfully suggest that the petition should be held, so as to preserve the Court's jurisdiction to decide the issues.

¹⁵ Because the respondent American Bankers Association is located in the District of Columbia, venue could always be proper here to challenge the NCUA's interpretation of the common bond requirement. See 28 U.S.C. 1391(e). Therefore, in light of the D.C. Circuit decision, it would be illogical for any member of the banking industry challenging the particular application of NCUA's interpretation to sue in any court other than the D.C. district court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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